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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1440

EDWARD W. MAHER, Commissioner of Social Services of the State of Connecticut
Appellant,

v.

SUSAN ROE, et als.
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of a three-judge United States District Court for the District of Connecticut, entered on January 16, 1975, declaring Section 275 of Volume 3, Chapter III, of the Connecticut Department of Social Services Public Assistance Program Manual, to be unconstitutional, and permanently enjoining its further enforcement, and submits this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court which is the subject of this appeal is not yet reported. A copy of that opinion

is attached hereto as Appendix A. Earlier opinions in this same case are reported in 380 F.Supp. 726 (D. Conn. 1974) (in which a single-judge District Court considered the pendant statutory claim and ruled that the state regulation was "invalid as contrary to the Medicaid provisions of the Social Security Act); and in 522 F.2d 928 (2d Cir. 1975) (in which the Court of Appeals reversed and remanded for convening of a three-judge district court to consider the constitutional issues, one judge concurring in part and dissenting in part).

JURISDICTION

This action was brought by plaintiffs (appellees) under 42 U.S.C. § 1983 and jurisdiction was based on 28 U.S.C. § 1343(3) and 28 U.S.C. § 2281. In the hearing on remand from the Court of Appeals before a three-judge District Court, the plaintiffs were seeking injunctive relief restraining the appellant-state commissioner of social services from the enforcement, operation and execution of a regulation of statewide applicability on the ground of its unconstitutionality.

The three-judge District Court, after a hearing on plaintiffs' motion for summary judgment, entered judgment on January 16, 1976 (Attached hereto as Appendix B), and notice of appeal was filed in that court on February 13, 1976 (Attached as Appendix C).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Georgia Public Service Commission*, 371 U.S. 285;

American Federation of Labor v. *Watson*, 327 U.S. 582;

King v. *Smith*, 392 U.S. 309.

STATUTES INVOLVED

Section 275, Volume 3, Chapter III, Connecticut Department of Social Services, Public Assistance Program Manual, is the regulation whose validity is involved in this action and it is set forth in Appendix D which is attached hereto.

QUESTION PRESENTED

Under Connecticut's Title XIX Medical Assistance ("Medicaid") Program, payment for medical services to eligible recipients is limited to those which are medically necessary for the patient's health. Payment for an abortion under the program will be made if the recipient's attending physician will certify that the abortion is either medically or psychiatrically necessary for the patient's health. The attending physician's certification of medical necessity in such a case is never challenged.[1]

The question presented by this appeal is:

> Whether the failure of Connecticut's medical assistance program to also include a provision for payment of the cost of an abortion which is admittedly not necessary for the patient's physical or psychiatric health violates the plaintiffs' rights under the equal protection clause of the Fourteenth Amendment, or any other of plaintiffs' constitutionally protected rights.

STATEMENT OF THE CASE

This action was brought by two women who were eligible for and receiving medical benefits under Connecticut's "Medicaid" program. Plaintiff Roe had had an abortion in September,

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[1] "The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician." *Answer To Interrogatories*, question 6A, Appendix E, p. 33.

1973, for which the welfare department had refused to pay the hospital bill of $244.20. Plaintiff Roe was pregnant at the time the suit was brought and she obtained a temporary restraining order which prevented the defendant welfare department from refusing to pay under its Medicaid program the costs of her abortion.

Neither plaintiff submitted to the (then) welfare department the certification of her physician that the abortion was medically or psychiatrically necessary for the patient's health.

On the plaintiffs' motion for a summary judgment, a single-judge District Court found that the constitutional claim was sufficiently substantial to invoke the jurisdiction of the court and to justify consideration of the pendant statutory claim without convening a three-judge court pursuant to 28 U.S.C. § 2281.

The District Court thereupon, found that the defendant's regulation concerning abortion services was "invalid as contrary to the Medicaid provisions of the Social Security Act" and permanently enjoined its enforcement. *380 F.Supp.* 726, 730.

On appeal by the defendant, the U. S. Court of Appeals (2d Cir.) reversed the decision of the District Court, holding that "while Title XIX *permits* federal reimbursement for elective abortions, it does not *forbid* state regulations limiting Medicaid payments for abortions to those which are therapeutically necessary for the health of the pregnant woman." *522 F.2d* 928, 935, and remanded the case for the convening of a three-judge court to consider the constitutional issues pursuant to 28 U.S.C. § 2281.

The three-judge District Court, on remand, after oral argument on plaintiffs' motion for summary judgment, found that "those provisions of § 275 that require certification that

an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them."

THE QUESTIONS ARE SUBSTANTIAL

Several lower federal courts have held unconstitutional State Medicaid policies which imposed restrictions on payment for abortion under Title XIX Medicaid programs.[2] The Supreme Court had not as yet, however, ruled on the constitutionality of this issue. In this case, unlike others which have reached this Court, the statutory question was first decided by the District Court, subsequently reviewed by the Second Circuit, and thereafter remanded to a three-judge District Court which determined the constitutional issues.

I.

THE BASIS OF THE LOWER COURT DECISION

The reasons for the District Court's decision are contained, essentially, in the following portion of the Memorandum of Decision:

> "The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protec-

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[2] *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), cert. granted ____ U.S. ____ (1975); *Doe* v. *Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe* v. *Myatt*, Civ. No. A3-74-48 (D.N.D. Jan. 27, 1975); *Doe* v. *Westby*, 383 F.Supp. 1143 (D.S.D. 1974), vacated and remanded for consideration of statutory grounds ____ U.S. ____, 43 L.Ed.2d 648 (1975); *Doe* v. *Rampton*, 366 F.Supp. 189 (D. Utah 1973); *Klein* v. *Nassau County Medical Center*, 347 F.Supp. 496 (E.D.N.Y. 1972), vacated and remanded for further consideration in light of *Roe* v. *Wade* and *Doe* v. *Bolton, Commissioner of Social Services of State of New York* v. *Klein*, 412 U.S. 925-26 (1973).

tion issue arises if the state refuses to reimburse expenses incurred in procuring an abortion. [footnote omitted]

"When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); cf. *Sosna* v. *Iowa*, 419 U.S. 393 (1975). Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972)."

Memorandum of Decision, (Appendix A, p. 18, at p. 20).

II.

CONNECTICUT'S MEDICAID PROGRAM DOES NOT DISCRIMINATE AGAINST ABORTION

Connecticut has limited the coverage under its Title XIX Medicaid program (as initially it believed was required by federal law), to providing payment thereunder for services which are medically necessary for the patient's health. But, even then, not all necessary medical services are provided for under Connecticut's program. Notable exclusions are many dental services such as periodontia and orthodontia.

Earlier in this litigation, on appeal from the single-judge district court, the Second Circuit held, in interpreting the federal statute (42 U.S.C. § 1396 *et seq.*) that, under Title XIX, a state *may* include payment for an elective abortion

under its Medicaid program but it is not *required* to do so. Connecticut, thereafter, elected *not* to include a provision for payment, under its program, for elective abortions, but to continue to pay thereunder for therapeutic abortions which were so certified by the patient's attending physician.

In arriving at its decision, the District Court has mistaken the focus of Connecticut's Medicaid program — that focus is neither upon pregnancy nor abortion. It is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. The court overlooked the fact that not only does the state's medical program exclude payment for elective abortions, it also excludes all other non-medically necessary medical care, including non-medically necessary prenatal or post-natal care. A State regulation which attempted to *exclude* from coverage under Medicaid an abortion which *was* medically necessary for the patient's health might well run afoul of the equal protection clause as an invidious discrimination. That is not the case here.[3] Connecticut makes no invidious discrimination against abortion under its Medicaid program.

III.

A STATE IS NOT REQUIRED TO FUND THE COST OF THE EXERCISE, BY AN INDIGENT, OF A CONSTITUTIONAL RIGHT

The District Court has held in its opinion that when the State fails to provide for payment of an elective abortion under its Medicaid program, while providing payment thereunder

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[3] From July 1, 1973 through June 16, 1974, payment was made for a total of 1,410 abortions under Connecticut's Title XIX program. *Answers To Plaintiffs' Second Interrogatories*, question 8, Appendix F, p. 36.

for a therapeutic abortion, as well as for prenatal and postnatal care, "it thus infringes upon a fundamental interest . . . and must assert a compelling state interest that justifies the incursion." (Appendix A, p. 20). Since it has previously been indicated that abortion is not singled out for treatment different from other medical services covered under the Connecticut's Medicaid program, this finding of the District Court is tantamount to a claim that if Connecticut chooses to provide its public funds (in conjunction with federal funds) to relieve one of the hardships caused by indigency (the lack of adequate medical care), it must also provide public funds to relieve other hardships caused by indigency, at least insofar as the exercise of a fundamental constitutional right is involved.

In *Helvering* v. *Davis,* 301 U.S. 619 (1937), the Supreme Court indicated that such a decision does not lie with the courts, when Justice Cardozo commented therein as follows:

"Congress may spend money in aid of the 'general welfare.' [citations omitted] There have been great statesmen in our history who have stood for other views.

We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra.* The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong,

a display of arbitrary power, not an exercise of judgment. This is now familiar law."

301 U.S. at 640.

In *Doe* v. *Wohlgemuth,* 376 F. Supp. 173 (1974), a three-judge district court held that a Pennsylvania Medicaid regulation, which also excluded payment for a non-therapeutic abortion, was unconstitutional.[4] But in that case even the majority opinion concluded by stating:

"We do not hold that the state must finance a fundamental right, but we do hold that the expression of that fundamental right cannot be the basis for invidious discrimination."

376 F.Supp. at 192.

In a dissenting opinion in that case, Judge Weis stated, *inter alia:*

". . . Thus the question here is not whether the state may prohibit certain categories of abortion. It does not do so. The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the

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[4] Pennsylvania's Medical Assistance Program imposed much more extensive restrictions on payment for abortion than did Connecticut's program. Before payment would be made for an abortion, Pennsylvania required that (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother; (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or (3) There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat of the mental or physical health of a patient; (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. *Doe* v. *Beal,* 523, F.2d 611, 613, 614.

State will pay for those abortions for the indigent arising from medical necessity. My conclusion is in the negative because there is no constitutional requirement that the State must finance the exercise of a 'fundamental' right, nor does a classification which distinguishes between medically necessary and non-necessary abortions offend the Equal Protection Clause.

"That the State has an affirmative duty to pay for the implementation of fundamental rights is, with certain narrowly carved exceptions, contrary to the weight of constitutional authority. The unusual situation may be typified by *Griffin* v. *Illinois*, 351 U.S. 12 . . . (1956), requiring that an indigent criminal defendant be furnished with transcripts at State expense. In an analogous situation, *Boddie* v. *Connecticut*, 401 U.S. 371 . . . (1971), held that an indigent could not be barred from securing a divorce because of inability to pay State assessed filing fees. . . .

". . .[A] scrutiny of representative Supreme Court determinations on the 'fundamental' right classification, including those in the right to privacy category, demonstrates no corollary of required State subsidy.

"While *Shapiro* v. *Thompson*, 394 U.S. 618 . . . [footnote omitted] found the right to travel among states to be fundamental, no suggestion has been made that transportation charges for the indigent must be paid by the State.

"While a person may have a fundamental right of privacy to have obscene material in his home, *Stanley* v. *Georgia*, 394 U.S. 557, . . . (1969) . . . there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to

purchase public address systems or printing presses for those unable to pay for them."

376 F.Supp. at 193-194.

It is submitted that the prior decisions of this Court do not support the proposition that a State is required to fund, for an indigent person, the exercise of a constitutional right. The reasoning of the District Court in this respect is contrary to the weight of constitutional authority.

IV.

ONLY A "RATIONAL BASIS" NEED EXIST FOR CONNECTICUT'S MEDICAID REGULATION REQUIRING THAT AN ABORTION BE MEDICALLY NECESSARY FOR THE PATIENT'S HEALTH

The District Court in this case has held that since, in its view, the State's Medicaid regulation regarding payment for abortion interferes with the exercise of a fundamental right, Connecticut must demonstrate that there is a compelling state interest which is being served for the regulation withstand judicial scrutiny, citing *Dunn* v. *Blumstein*, 405 U.S. 330, 338-342 (1972).

But if, as the appellant has claimed herein, *supra*, abortion is not the subject of invidious discrimination under Connecticut's medical program; and, if, as is also contended, a State is not required to fund the exercise of an indigent's constitutional right, then there is no interference by the defendant with plaintiffs' fundamental right to have an abortion. The issue involved is, instead, the plaintiffs' right to receive medical welfare benefits. That right has never been held to be a fundamental one. In determining whether there is a violation of the Equal Protection Clause in such a case, Connecticut's

regulation is subject only to the "rational basis" test set forth in *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

In *Doe* v. *Beal*, 523 F.2d 611 (1975), the Third Circuit, sitting *en banc*, held that Pennsylvania's Medical Assistance Program regulations and procedures, as they apply to reimbursement for abortions were invalid because they were inconsistent with Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. It was therefore unnecessary for that court to reach the constitutional issues. However, in a dissenting opinion in that case, Judge Kalodner (with Judge Adams concurring therein) did comment on the holding of the district court which held that the Pennsylvania regulations were "unconstitutional because they are in violation of the Equal Protection Clause since they create an unlawful distinction between invidual women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion." *Doe* v. *Wohlgemuth*, 376 F.Supp. at 191.

The lower court in that case had held that Pennsylvania must show a compelling reason for limiting payment for abortion under its Medical Assistance Program to situations requiring necessary medical care. In his dissent, Judge Kalodner stated *inter alia:*

> "The cornerstone of the plaintiffs' contention is that the Regulations, in the *absence of a compelling state interest*, violate the Equal Protection Clause in that they discriminatorily divide pregnant eligibles *into two classes* — one which chooses to carry pregnancy to full term delivery, and another which elects to terminate pregnancy for non-therapeutic reasons.
>
> "The fallacy of the stated contention is that it disregards the fact that Pennsylvania in its medicaid program has commited itself to extend medical care to its eligibles only where *'necessary medical care' is required.*

The only classification made by the Regulations is between necessary medical care and non-necessary medical care. Such a classification does not call into play the 'compelling state interest' test. It is subject only to the 'reasonable basis', otherwise stated, 'rational basis' test, spelled out in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970). There, the Court held that a state regulation which reduced family welfare benefits did not violate the Equal Protection Clause. In doing so it said in relevant part at page 485, 90 S.Ct. at page 1161:

> 'In the area of economics and *social welfare*, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. *If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification* 'is not made with mathematical nicety or because in practice it *results* in *some inequality.' Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 55 L.Ed. 369]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 [33 S.Ct. 441, 57 L.Ed. 730]' (emphasis supplied).

"I am of the opinion that the classification between 'necessary medical care' and 'non-necessary medical care' survives the application of the 'reasonable basis' and/or 'rational basis' tests."

523 F.2d, at 633.

Appellant submits that, in determining whether plaintiffs had been denied equal protection, it was error for the District

Court to apply the "compelling state interest" test to Connecticut's Medicaid regulation. Prior decisions of this Court indicate that in the area of economics and social welfare the appropriate test to be applied is the "rational basis" test of *Dandridge, supra,* under which:

> ". . . '[A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U.S. 420, 426 . . ."

397 U.S. at 485.

Applying this test to the instant case, Sec. 275 of Connecticut's Medicaid regulation easily meets the test prescribed by *Dandridge.*

But even if, as the district court has held, Connecticut must show a compelling interest in order to limit the scope of its Medicaid program to those services which are medically necessary for the patient's health, it is submitted that such a compelling interest is present in this case. That interest is not the one as to which the district court speculated in its decision, namely, that "The only other possible state interest would be that of avoiding the expenditure of public funds for a purpose the state finds morally objectionable."[5]

In Connecticut, as in perhaps most other states, the Title XIX Medicaid program is the single most costly of the State's public assistance programs, easily surpassing in expenditure even the AFDC program. At a time when Connecticut is

[5] In *Rosado* v. *Wyman,* 397 U.S. 397, Justice Harlam stated, *inter alia*:

> "We reach our conclusions without relying on the finding made by the court below that in § 131-a New York was *attempting* to constrict its welfare payments. Speculation as to legislative and executive motive is to be shunned. . . ." [emphasis in original]

397 U.S. 419.

undergoing a severe fiscal crisis, the need of the State to limit the scope of its medical program and the expenditures thereunder is certainly a compelling state interest. Not merely the increased cost of non-medically necessary abortions is involved, (as the District Court seemed to believe) but the cost of payment for all other recognized medical procedures is involved, whether they be medically necessary or not, since, if non-medically necessary abortions must be included in the program, how can these other medical services be excluded. This is certainly a compelling state interest which justifies limiting the scope of Connecticut's medical assistance program.

Appellant is also appealing from the district court's decision which invalidated the "prior approval" requirement of Section 275 of Connecticut's Medicaid regulation, believing it was error to decide this issue on a motion for summary judgment since on this question there was a disputed issue of fact.

There was no *competent* evidence introduced to support the district court's finding that "The prior approval procedure creates the sort of delay that the Supreme Court found constitutionally repugnant in *Doe* v. *Bolton.*" (*Memorandum of Decision,* Appendix A, p. 20, at p. 23).

Defendants had submitted a counteraffidavit[6] in reply to plaintiffs' motion for summary judgment indicating that in critical situations it was possible for a physician to obtain approval from the department by telephone, to be followed later by the necessary paper work. Defendants had also submitted a motion to strike the affidavits submitted with plaintiffs' motion for summary judgment because defendants had been deprived of their right to cross examination. The district court indicated it would reserve decision on this motion and rule

[6] See Appendix H, p. 39.

upon it "at the same time we rule on the summary judgment motion." (See Appendix G, p. 38, Excerpt from Transcript of Oral Argument on Motion for Summary Judgment). The lower court, however, failed to rule on this motion.

The defendants had also indicated that the average time lapse between receipt of a request for prior approval in the office of the welfare department to the time approval was mailed out to the initiating party was approximately three days.[7] However, it would serve no purpose to discuss this question further at this stage of the proceedings.

[7] Appendix E, *Answers To Interrogatories*, question 4, p. 33.

CONCLUSION

There are at least two reasons why the question presented by this appeal is sufficiently substantial as to require plenary consideration:

1) the resolution of the question of whether a State's Medicaid program must provide for payment of the cost of a non-therapeutic abortion will have immediate importance far beyond the particular facts and parties involved in this case;

2) the three-judge District Court has decided a question of federal law which has not previously, but should be, settled by this Court.

Respectfully submitted,

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APPENDIX A

United States District Court

District of Connecticut

Civil No. N-74-17

SUSAN ROE, individually and on behalf of all others similarly situated, ET AL

v.

NICHOLAS NORTON, individually and as Commissioner of Welfare for the State of Connecticut, ET AL

Before: TIMBERS, *Circuit Judge*, ZAMPANO and NEWMAN, *District Judges.*

MEMORANDUM OF DECISION

NEWMAN, *District Judge:*

This is a motion for summary judgment by the plaintiffs in a lawsuit challenging the constitutionality of the Connecticut Department of Welfare's refusal to reimburse welfare recipients for the expense of an abortion, absent a prior showing that the abortion is necessary to preserve the physical or psychiatric health of the woman. The state originally defended its policy on the ground that Title XIX (Medicaid) of the Federal Social Security Act, 42 U.S.C. § 1396 *et seq.*, prohibited payment for elective abortions. A one-judge District Court rejected that contention, construing Title XIX neither to prohibit such payments nor to permit a state to refuse making them, 380 F.Supp. 726 (D. Conn. 1974). On appeal, the Second Circuit, No. 74-1874 (2d Cir. July 31, 1975), held that the Social Security Act was entirely neutral as to abortion payments, neither requiring the states to pay for any abortion services at all, nor forbidding the states from reimbursing welfare

recipients for the expense of an elective abortion. The case was remanded for consideration of the constitutional issues by this three-judge court, in the event the state chose to continue its policy once the mistaken reliance on Title XIX was removed. The state has elected to keep its policy in force.

Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, Ch. III, § 275 requires, prior to the performance of a first-trimester abortion for which welfare assistance is sought, that a certificate be submitted from the attending physician that the abortion is "recommended as medically or psychiatrically necessary."[1] The plaintiffs and the class they represent,[2] claim that this regulation is invalid because it denies them equal protection of the law.

Every plaintiff in this lawsuit is a potential medicaid recipient whose pregnancy was terminated during the first trimester of pregnancy and who elected to undergo an abortion for reasons unrelated to preservation of the mother's health. Plaintiff Susan Roe was pregnant when this action was commenced, and her physician did not believe that her health would be jeopardiped if she carried the pregnancy through to term. Therefore he did not submit an attestation of medical necessity for the abortion that Ms. Roe wished to have performed. Plaintiff Roe underwent an abortion for which the State Welfare Department refused to authorize medicaid payment because no prior approval based upon the medical necessity standard had been obtained. Subsequent to the Court of Appeals remand, the District Court issued temporary restraining orders enjoining the defendants from refusing to reimburse three additional women for the costs of their elective abortions.

In *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Supreme Court held that encompassed within a woman's constitutional right of personal privacy is

the unfettered right to terminate a pregnancy through an abortion performed by a licensed physician during the first trimester of pregnancy. Before the end of approximately twelve weeks of pregnancy, the state may not interfere in any manner with the performance of an abortion. See *Abele* v. *Markle*, 369 F.Supp. 807 (D. Conn. 1973).

That a constitutional right to an abortion exists does not necessarily mean that there is a constitutional right to a *free* abortion, with the state obligated to absorb the cost of the medical procedure. *Cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971). As the defendants point out, in *Dandridge* v. *Williams*, 397 U.S. 471 (1970), the Supreme Court declined to hold that welfare assistance is a fundamental right. The present case is not controlled by the rationale or the result in *Dandridge*, however, because in *Dandridge* the state was asked to allocate additional funds solely to avoid decreasing the average AFDC grant per member of a dependent family. In *Dandridge* the state's fiscal policy had no direct effect whatsoever upon the exercise of a constitutionally protected right.

The Constitution does not require the state to pay for any medical services at all. Nevertheless, once a state chooses to establish a program for reimbursing the medical expenses of the indigent, and adopts as part of that program a provision that requires state funding for medical expenses arising from pregnancy, a serious equal protection issue arises if the state refuses to reimburse expenses incurred in procuring an abortion.[3]

When Connecticut refuses to fund elective abortions while funding therapeutic abortions and prenatal and postnatal care, it weighs the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *cf. Sosna* v. *Iowa*, 419 U.S. 393 (1975). Her choice is

affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion. When the state thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion. *Dunn* v. *Blumstein*, 405 U.S. 330, 338-42 (1972).

The state's initial position in this litigation was that it failed to reimburse elective abortions solely because it believed that federal law prohibited such payments. *Roe* v. *Norton*, *supra*, 380 F.Supp. at 728. Now the state asserts that it has a fiscal interest in refusing to fund elective abortions for welfare recipients. This interest is wholly chimerical because abortion is the least expensive medical response to a pregnancy.[4] An abortion normally requires two expenditures of funds: a consultation to determine that an abortion is medically safe, and the medical procedure itself. By contrast, in the event of childbirth, the state pays the more extensive costs of prenatal, obstetrical, and postpartum care, as well as prenatal support for the unborn child. *Klein* v. *Nassau County Medical Center*, 347 F.Supp. 496, 500 (E.D.N.Y. 1972) (three-judge court), *remanded* in light of *Wade* and *Bolton*, 412 U.S. 925 (1973). Furthermore, the birth of a child to a welfare mother increases the burden on the state's welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance.[5] The state's assertion that it saves money when it declines to pay the cost of a welfare mother's abortion is simply contrary to undisputed facts.

The only other possible state interest would be that of avoiding the expenditure of public funds for a purpose the state finds morally objectionable. The Supreme Court in *Roe* v. *Wade* acknowledged that abortion is a sensitive issue, but nevertheless announced the principle that a woman has a constitutional right to have an abortion, at least during the first trimester of pregnancy. The state may not justify its refusal

to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right. See *Doe* v. *Rose*, 499 F.2d 1112, 1117 (10th Cir. 1974). The state's unarticulated position on the morality of abortion cannot be considered a compelling state interest that will justify the weighing of a choice against the exercise of a constitutional right. See *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534-35 and n.7 (1973).

The state has advanced no interest in not paying for elective abortions that would satisfy the compelling state interest test — nor even one that would satisfy the less rigorous rational relationship test. Accordingly, that portion of § 275 which requires that an abortion be medically necessary is unconstitutional and may not be enforced by the state. *Wulff* v. *Singleton*, 508 F.2d 1211 (8th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3674 (June 23, 1975); *Doe* v. *Rose*, *supra*; *Doe* v. *Myatt*, No. A3-74-48 (D.N.D. Oct. 30, 1975) (three-judge court); *Doe* v. *Wohlgemuth*, 376 F.Supp. 173 (W.D. Pa. 1973) (three-judge court), *aff'd on other grounds sub nom. Doe* v. *Beal*, Nos. 74-1726 and 74-1727 (3d Cir. July 21, 1975).

The state has expressed the concern that invalidation of its policy on abortion payments will obligate it to pay for all elective procedures, such as cosmetic surgery and orthodonture. The fear is groundless. In declining to pay for these procedures, the state is not discouraging the exercise of any constitutional right.

The validity of the prior approval procedure during the first trimester of pregnancy is also before this Court.[6] The defendants, other than noting that there are other forms of medical care that require prior authorization before a medicaid claim will be honored, have asserted no interest justifying the prior authorization procedure for abortions. The state does not require prior approval for reimbursement for expenses arising out of childbirth. It has asserted no justification for requiring a different procedure when dealing with an abortion performed during the first trimester of pregnancy. Plaintiffs have submitted the affidavits of physicians who maintain that any delay in the performance of an abortion adds to the medical danger faced by the pregnant woman. The prior approval procedure creates the sort of delay that the Supreme Court found constitutionally repugnant in *Doe* v. *Bolton, supra*. Thus the state may not require the prior approval form to be submitted before an abortion is performed, and may not rely on the lack of such prior approval for failure to reimburse the expenses of the abortion. *Doe* v. *Bolton, supra; Word* v. *Poelker*, 495 F.2d 1349, 1351-52 (8th Cir. 1974); *Wulff* v. *Singleton, supra*, at 1215. Similarly, § 275's requirement that evidence of the patient's consent be presented to the state prior to a first-trimester abortion furthers no legitimate state interest that justifies the distinction between abortions and other medical responses to pregnancy.[7] This provision also contravenes the Equal Protection Clause. See *Wolfe* v. *Schroering*, 388 F.Supp. 631, 636 (W.D. Ky. 1974).

No state regulation of medicaid payments for abortions performed in the first trimester of pregnancy can impose conditions or requirements that are not equally applicable to medicaid payments for childbirth, if such conditions or requirements tend to discourage a woman from choosing an abortion or to delay the occurrence of an abortion that she has asked her physician to perform. Accordingly, those provisions of § 275 that require certification that an abortion is medically necessary are unconstitutional, and the defendants are hereby enjoined from enforcing them. Further, the defendants are enjoined from requiring, prior to the performance of an abortion, any form of approval as a condition for the

reimbursement of the expenses of an abortion performed during the first trimester of pregnancy.

Dated at New Haven, Connecticut, this 31st day of December, 1975.

.....

WILLIAM H. TIMBERS
United States Circuit Judge

.....

ROBERT C. ZAMPANO
United States District Judge

.....

JON O. NEWMAN
United States District Judge

FOOTNOTES

[1] Section 275 provides in relevant part:

> Therapeutic abortion services within the State are covered under Title XIX when all the following conditions are met:
>
> 1. The abortion is recommended as medically necessary by the attending physician in an accredited hospital or licensed clinic. . . .
> 2. The written consent for the abortion is secured from the patient. . . .
> 3. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

[2] The District Court certified the lawsuit as a class action under Fed. R. Civ. P. 23(b)(2). 380 F.Supp. at 730.

[3] The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions in *Roe* and *Doe*. *See Roe* v. *Wade*, *supra*, at 129-147, 148-50, and 170 (Stewart, J. concurring); *Doe* v. *Bolton*, *supra*, at 218-20 (Douglas, J. concurring); *Doe* v. *Beal*, Nos. 74-1726 and 74-1727 (3rd Cir. July 21, 1975) at 19; *Wolfe* v. *Schroering*, 388 F.Supp. 631, 637 (W.D. Ky. 1974); *but cf. Roe* v. *Norton*, No. 74-1874, *supra*, at 5317-18 (Mulligan, J., concurring and dissenting).

[4] Abortion has been recognized as both an inexpensive and safe alternative to pregnancy in several recent decisions. *E.g.*, *Doe* v. *Beal*, *supra*, at 19; *see Roe* v. *Wade*, *supra*, at 149-50 and n.44.

[5] *Dandridge* v. *Williams*, *supra*, is a stark example of the burdens that the state's treasury must carry, and the hard choices the state must make, when additional children are born to a family that is already receiving welfare assistance.

[6] The procedures established by the State Welfare Department pertaining to reimbursement for an abortion performed during the second trimester of pregnancy are not before the Court. No plaintiff in this action had an abortion performed or sought permission for the performance of an abortion later than the first trimester of pregnancy. Accordingly, they have no standing to challenge the procedures established by the state with regard to the second trimester of pregnancy. *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972).

[7] Whatever power the state may have to assure itself that public funds are not used for an abortion unless the woman's consent is established can be exercised by requiring, prior to actual reimbursement, presentation of evidence of consent that was obtained from the woman prior to the abortion. Requiring presentation of evidence of consent at that time does not delay the abortion nor otherwise impair any right of the woman.

APPENDIX B

United States District Court

District of Connecticut

Civil No. N 74-17

SUSAN ROE, individually and on behalf of all others similarly situated, et al

v.

EDWARD MAHER, individually and as Commissioner of Social Services for the State of Connecticut, et al.

SUMMARY JUDGMENT AND ORDER

This cause having come on for consideration on plaintiffs' motion for summary judgment and the Court having rendered its Memorandum of Decision on plaintiffs' motion for summary judgment, under date of December 31, 1975, granting said motion,

It is hereby ORDERED and ADJUDGED as follows:

1. This action shall be maintained as a class action under Fed. R. Civ. P. § 23(b)(2);

2. Judgment be and is hereby entered in favor of the plaintiffs and the class they represent, declaring that Connecticut Welfare Department, Public Assistance Manual, Vol. 3, Ch. III, § 275 is invalid as contrary to the United States Constitution, insofar as it requires certification that an abortion is medically or psychiatrically necessary, and insofar as it requires, prior to the performance of an abortion, any form of approval or consent or any other condition or requirement for the reimbursement of the expenses of an abortion performed during the first trimester of pregnancy.

3. Defendants, their agents and employees, are hereby enjoined from requiring as a condition for the reimbursement by Medicaid of the expenses of an abortion performed during the first trimester of pregnancy:

a) the existence of medical or psychiatric necessity, or any statement or certification that the abortion is medically or psychiatrically necessary;

b) prior approval of or prior authorization or any other form of approval for the abortion by the defendants, their agents or employees, or any person.

c) receipt of evidence of the patient's consent by defendants, their agents or employees prior to the performance of a first-trimester abortion;

d) any other condition or requirement for reimbursement for abortion services which is not equally applicable to payment and/or reimbursement for childbirth and other forms of obstetrical care, if such conditions or restrictions tend to discourage a woman from choosing an abortion or to delay the performance of an abortion that she has asked her physician to perform.

4. Defendants are hereby ordered to notify in writing within two weeks of the date hereof all persons eligible for Medicaid, or medical assistance, from the State of Connecticut, that abortion is a physician's service now eligible for Medicaid reimbursement and that no proof of medical necessity, prior authorization or other condition or requirement is necessary to receive such reimbursement. Such notice shall be printed in both English and Spanish.

5. Nothing contained hereby shall be interpreted to preclude the defendant Commissioner of Social Services from

imposing reasonable regulations upon abortions performed beyond the first trimester.

The parties have consented to the form of this judgment.

Dated at New Haven, Connecticut, this 16th day of January, 1976.

.....

SYLVESTER J. MARKOWSKI
Clerk, United States District Court

Judgment may enter.

.....

JON O. NEWMAN
United States District Judge

APPENDIX C

United States District Court

District of Connecticut

Civil No. N-74-17

FEBRUARY 11, 1976

SUSAN ROE, ET AL.
Plaintiffs

v.

EDWARD W. MAHER, Individually and as Commissioner of Social Services of the State of Connecticut
Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Edward W. Maher, Commissioner of Social Services of the State of Connecticut, the defendant above named hereby appeals to the Supreme Court of the United States from the permanent injunction enjoining the defendant from further enforcing Index (Section) 275 of the Connecticut Department of Social Services Policy Manual entered in this action on the 16th day of January, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1253.

.....

EDMUND C. WALSH
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114
Tel.: 566-7014

Attorney for the Defendant

APPENDIX D

Connecticut State Department of Social Services
Medical Assistance Program

Manual Vol. 3 — Chapter III

MEDICAL SERVICES

275 *Abortion Services*

The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.

2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. If the patient is *beyond* the first trimester of pregnancy, the abortion must be perfomed in an accredited hospital and the Chief of Obstetrics and Gynecology certifies in writing that the attending physician has hospital privileges and the abortion will be performed in that hospital.

3. The written request for the abortion is submitted by the patient, and in the case of a minor, from the parent or guardian.

In the case of a committed child, a written consent for the abortion is secured from the Commissioner of the Department of Children and Youth Services as guardian.

4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

Procedures

1. The hospital in which the requested abortion it to be performed, or the clinic which is licensed to perform abortions during the first trimester of pregnancy will submit Form W-217, "Letter Requesting Certification for Reimbursement Abortion", to Health Services in Central Office in which the attending physician certifies that the patient, parent or guardian has requested the performance of an abortion. This is signed by the attending physician in the accredited hospital or licensed clinic when the abortion is performed during the first trimester.

When the abortion is to be performed *beyond* the first trimester of pregnancy, the Form W-217a is completed by both the attending physician and the Chief of Obstetrics and Gynecology. The Chief of Obstetrics and Gynecology certifies that the attending physician has hospital privileges and that the abortion will be performed in that hospital.

2. In addition, Form W-601, "Request for Authorization for Professional Services" must accompany Form W-217 or Form W-217a and should include a statement indicating the medical need for the abortion.

For PA recipients and recipients of services from Unmarried Mothers program, the request will be reviewed by competent medical authority in the Division of Health Services in Central Office, and the hospital or clinic will be notified of the Department's decision by returning two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files.

For Committed Children, completed Forms W-601, 217 and 217a together with Social Data prepared by the D.C.Y.S. Regional Office are submitted to the Department of Children and Youth Services Central Office. Social Data includes all

pertinent background information regarding race, age of the individual, commitment date, the current situation and the individual's wishes and the specific medical necessity.

The packet will then be referred to the Division of Health Services for medical review and recommendation.

After review and recommendation by the Division of Health Services, the complete packet (Forms W-601, W-217 or W-217a and Social Data) will be returned to the Commissioner of Children and Youth Services for his review, decision and signing of the anesthesia permit if he consents to the abortion. If consent is given, Forms W-601, W-217 and W-217a are then returned to the Division of Health Services.

The hospital or licensed clinic is then notified by the Division of Health Services of the Department's decision by forwarding two (2) copies of Form W-601 to the hospital, maintaining one (1) copy for its own files. The Department of Children and Youth Services makes necessary arrangements for the individual's admission to the hospital.

Revised 9-15-75

APPENDIX E

EXCERPTS FROM ANSWERS TO INTERROGATORIES

• • •

4. *QUESTION:* What is the average time lapse between receipt of a request for prior approval in the office of the State Welfare Commissioner and the return of said receipt to the applicant?

ANSWER: Approximately three days from the time of receipt of request until the time it is mailed out to initiating party. (Hospital)

• • •

6A. *QUESTION:* Define the phrase "medically necessary for the patient's health".

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

• • •

7A. *QUESTION:* Define and describe by example every medical circumstance which is included in the category of "'medically necessary for the patient's health" with respect to abortion.

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

7B. *QUESTION:* Define and describe by example every medical circumstance included in the category of "'not medically necessary for the patient's health".

ANSWER: The welfare department makes no attempt to define this term. This is a matter left entirely to the attending physician.

• • •

Dated at Hartford, Connecticut, this 21st day of April, 1974.

NICHOLAS A. NORTON
Commissioner of Welfare
State of Connecticut

BY: .....
HAROLD MCINTOSH, *Assistant Director of Health Service*
Connecticut State Welfare Dept.

APPENDIX F

EXCERPTS FROM ANSWERS TO PLAINTIFFS' SECOND INTERROGATORIES TO DEFENDANTS

• • •

2b. QUESTION: List and describe any and all differences between this regulation and defendants regulations regarding abortion as of January 22, 1974.

ANSWER: The August 26, 1975, revision differs from the policy as of January 22, 1974, in the following respects:

1) The Chief of Obstetrics/Gynecology is no longer required to sign the attending physician's certificate of medical necessity;

2) The latter revision, unlike the policy in effect in January, 1974, distinguishes between an abortion being sought in the first trimester of the pregnancy, and an abortion to be performed beyond the first trimester.

Form W-217 (Appendix D) is used for first trimester abortions. It contains only the certification of medical necessity to be signed by the attending physician.

Form W-217a (Appendix E) is used for abortions which have progressed beyond the first trimester of pregnancy. In addition to the attending physician's certificate contained on Form W-217, Form W-217a also contains a certification by the Chief of Obstetrics and Gynecology that the attending physician has hospital privileges at the indicated hospital, and that the abortion will be performed in that hospital.

3a. QUESTION: Define the following phrases as used in said amended § 275:

"medically necessary"
"therapeutic abortion services"

ANSWER: The Department of Social Services makes no attempt to define the term "medically necessary." This is a matter left entirely to the medical judgment of the patient's own attending physician.

The term "therapeutic abortion services" is defined in Index 275 of the policy manual as an abortion service covered under Title XIX when "[T]he abortion is recommended as medically necessary by the atending physician . . ."

3b. QUESTION: Define the phrase "medically necessary for the patient's health" as used in forms W-217 and W-217a;

ANSWER: See Answer to Question 3a.

• • •

7. QUESTION: From August 26, 1975, to the date of these Interrogatories, how many requests for reimbursement for abortion have been refused by any of the defendants, their agents or employees? What was the reason for such refusal?

ANSWER: Since August 26, 1975, to October 20, 1975, two hundred forty-one (241) requests for payment for abortions under the Title XIX Program have been approved; five (5) requests have been rejected because Form 601 and/or Form W-217 had not been completed.

8. QUESTION: During the period June 23, 1975, to August 26, 1975, how many abortions were reimbursed by the medical assistance program and at what cost to the state?

ANSWER: For the period from July 1, 1973, thru June 16, 1974, payment was made for a total of one thousand four hundred and ten (1,410) abortions under the Title XIX program. After the U.S. District Court entered an order, on June 16, 1974, enjoining the enforcement of Index 275 of the defendant's Policy Manual, the Department no longer maintained a

record of the number of abortions paid for under Title XIX. It would be possible to retrieve this information from the department's computer, but it would require the writing of a special program — a burdensome task to impose on a Department which is experiencing a continually increasing workload.

• • •

Dated at Hartford, Connecticut, this 21st day of October, 1975.

EDWARD W. MAHER
Commissioner of Social Services

BY: .....
HAROLD V. MCINTOSH
Assistant Director, Health Services

APPENDIX G

EXCERPT FROM TRANSCRIPT OF ORAL ARGUMENT ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

• • •

MR. WALSH: . . . I have an addition, if Your Honor please, a motion to strike the affidavits submitted by the plaintiffs with their motion for summary judgment. I don't object to the affidavits in the courts evaluating the summary judgment issue of whether or not there is a legal issue but I do think they are inadmissible for purposes of determination on the merits.

JUDGE TIMBERS: The Court has decided, Mr. Walsh, as a matter of procedure to reserve decision on your motion to strike. We will rule on that at the same time we rule on the summary judgment motion. I think we have your position well in mind set forth in the papers.

MR. WALSH: Thank you.

JUDGE TIMBERS: Anything further?

• • •

APPENDIX H

AFFIDAVIT

My name is Harold V. McIntosh, and I am employed by the Department of Social Services, State of Connecticut at 110 Bartholomew Avenue, Hartford, Connecticut, as Assistant Director of Health Services. In that capacity I am intimately familiar with the operation of the Department's operation of its Title XIX Medicaid Program, and also with the requirements for payment for abortion thereunder, when such an abortion is required for the patient's health.

I have read the Plaintiffs' Memorandum of Law In Support of Motion for Summary Judgment in this case and I make the following statements in response thereto:

1). I know of no instance where a woman, eligible under the Program, was deprived of a medically necessary abortion operation, so certified by her physician, because of an undue delay in the processing of her application. When the department is notified by telephone by an attending physician that he believes that any delay in performing the abortion operation would pose an increased risk to the patient's health, the Department of Social Services will give oral approval to that physician immediately, by telephone, of the patient's application, on condition that the physician will state that he has signed the certificate of medical necessity and will forward it to the department;

2). Contrary to the assertions contained in the Plaintiffs' Memorandum of Law, abortions which are required for the patient's health are not singled out from all other

services by requiring prior approval therefor. There are a great many services provided under the Medicaid services which require prior approval from the Department;

3). Despite language contained in the Department's current policy on abortions which plaintiffs' have interpreted otherwise, the Department of Social Services *accepts at face value* the certification of medical necessity of the patient's attending physician.

There is no "second-guessing" of the attending physician's certification, nor is there any "review" of his medical judgment. This has been the practice of the Department, for at least since June, 1974 when the U.S. District Court enjoined enforcement of the Department's requirement that an abortion be certified as necessary for the health of the patient;

4). The Medicaid program in Connecticut provides only for necessary medical services, except where federal law mandates that certain other services be provided, as, for example, family planning services and services for persons under 21 years of age under the Early Periodic Screening, Detection and Treatment Program (EPSDT). But even where services are medically necessary, there are exclusions and limitations upon some services even though they are medically necessary.

5). From August 26, 1975 when the Department re-instated, after the decision of the U.S. Court of Appeals, its policy of requiring a certificate of medical necessity from the patient's physician before an abortion would be paid for under the Program, a total of 241 medically necessary

abortions have been approved for payment under the State's Title XIX program, and five (5) have been disapproved for failure to comply with the Department's policy.

Dated at Hartford, Connecticut this 22nd day of October, 1975.

HAROLD V. MCINTOSH
Assistant Director, Health Services
Connecticut Department of Social Services